United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2005

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FOR THE SECOND CIRCUIT

DOCKET NO. 74-2005

ESTATE OF SUMNER GERARD, COSTER GERARD, SUMNER GERARD, JR., JAMES W. GERARD, II and CHEMICAL BANK, EXECUTORS,

Appellants,

- against -

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

ON APPEAL FROM THE UNITED STATES TAX COURT

REPLY BRIEF ON BEHALF OF APPELLANTS

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Appellants' Reply Brief

There is uncontroverted evidence in this case indicating (a) that Decedent's eldest son urgently required financial assistance during the period under consideration and (b) that Decedent was considering whether to provide such assistance in some form shortly before he actually transferred the property (stock) involved.

Assuming this to be true, we believe that the central issue in dispute on appeal is whether the Court below was clearly erroneous by looking to other factors in determining that Decedent's dominant motive at the time of transfer was in contemplation-of-death within the meaning of Section 2035 of the Internal Revenue Code of 1954, as

amended (the "Code").

The Court below, as well as the Government, looked essentially to Decedent's age, his health, the absence of a pattern of gift giving, and the nature of the property transferred in concluding that Decedent's dominant motive was in contemplation of death.

The Court below also held that the alleged transfers "...were in the same proportion as the subsequent division of the estate provided in the will. This entire pattern of activity and the identical proportionality in each instance also indicates that the transfers were testamentary in nature." (Opinion, p. 760).

As was indicated in our main brief, this is incorrect. The ultimate beneficiaries of the vast bulk of Decedent's estate were his great-grandchildren, or more remote issue, and not his sons, as found by the Court below. (Petitioner's Brief, p. 47).

Decedent's health will not be reviewed again in this reply brief. It is sufficient to say that Decedent had the normal concerns for a man of his years concerning his health, but he was not (and knew that he was not) afflicted with any terminal illnesses, or any malady which would be the cause of his death. In point of fact, Decedent died from an intestinal hemmorage and not from any of the illnesses discussed in the Government's brief. Petitionersdo not deny that

Decedent suffered from a number of discomforts and infirmaties associated with age which limited his activities. Yet his condition did not change materially during the crucial period involved. (App 202a, 203a).*

The lack of a pattern of direct gift giving by the Decedent is not contested. Decedent did make cash contributions to his grandchildren of $1,500 to $2,000 annually. He also transferred an aggregate of $170,998 in trust for his sons in 1935. What petitioners have urged repeatedly is that Decedent continually provided indirect assistance to his son Sumner Gerard, Jr. over the years, either by permitting loans to be made to his son by the Ennis Company, his closely held corporation, or by making collateral available to banks, which in turn advanced funds to his son. The gift by Decedent of shares of Aeon Realty Company to his son on January 2, 1964 to be used as collateral followed this format.

The argument that there was an estate planning motive (Opinion, p. 761) when Decedent selected Aeon shares (rather than shares of IBM for example) to effect the transfer defies careful analysis. Aeon was a closely held company, owning improved and unimproved real estate scattered over a wide area of New York and New Jersey. A valuation of the Aeon shares for federal estate tax purposes was inevitable at Decedent's death, and he retained

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*References in the form "App . . . a" refer to the Appendix filed with the United States Court of Appeals for the Second Circuit.

a majority interest in Aeon following the transfer of Aeon shares to his son, so that there was no question of a valuation discount for minority ownership. How the process of negotiation of a valuation issue with respect to Aeon shares with the Internal Revenue Service would evolve somehow to the benefit of Decedent's estate, is not clear to petitioners, and, we submit, is not a point of substance. Supposed difficulties which might be anticipated by the Estate in selling such a majority interest to raise estate taxes is a truly spurious contention.

The Government contends in substance that the testimony of Hugh Galusha, a financial adviser to Decedent, indicates that Mr. Galusha was concerned about the financial condition of his son but that the Decedent was not. Mr. Galusha's testimony, of course, concerns conversations with Decedent directly involving not only the question whether financial assistance was necessary for Decedent's son, but, if so, what form of assistance might be given.

The Government's brief (p. 15), contending Decedent was not concerned about his son's financial plight, quotes Mr. Galusha's testimony:

> "...I have faith that Jerry will be able to do it. He has the ranch under control... He has other kinds of investments going, and some of them are paying off." (App 147a).

Yet the full text of that particular part of Decedent's conversation with Mr. Galusha reveals a different emphasis. Mr. Galusha testified as follows:

THE WITNESS "It was a continuing problem. He said to me that he wanted to help Jerry out. He was con--he did not want Jerry to have control, the right to dispose of property.*** Mr. Gerard explained to me his pattern of financing. He explained to me the system of mortgaging property believed--he said to me, I have no property that isn't encumbered. I believe in borrowing against property. I particularly want to give Jerry something against which he can borrow, but which he cannot dispose of, that will give him the collateral for a new kind of loan.

I told him this to a country boy was awfully hard to understand, that the creation of debt to me was intolerable, and that the Ennis Company and the Gerard, Junior family was in debt up to their ears with little likelihood of working out and he said that I have faith that Jerry will be able to do it. He has the ranch under control, about which I expressed my misgivings. He has other kinds of investments going, and some of these are going to pay off.

Q Did Mr. Gerard, Senior mention to you any property he proposed to use for the transfusion you mentioned?

A Yes. He was going to transfer shares of stock in one of their family corporations called Aeon, or--pronouncing it correctly.

Q Were the a--the company you previously mentioned in your testimony as Aeon Realty Company, a New York corporation?

A Yes.

(App 146-147a)

Clearly, then, Decedent contemplated that with the additional assistance to his son in the form of collateral for a loan, things would somehow be better, not that his son, unassisted, would be able to stabilize his financial situation.

Lastly, the Government has seized upon an interlude of seven months between the time Sumner Gerard, Jr. received shares of Aeon and the time he actually used the shares as collateral for a loan. The implication is that Sumner Gerard, Jr. did not actually need any such financial assistance. (Government Brief, p. 14).

In rebuttal, it should be noted that Sumner Gerard, Jr. continued to receive loans from other sources during this period, and that he had been urging his father to assist him for some time, citing particularly his forthcoming educational expenses, and that the timing of the assistance was Decedent's not Sumner Gerard, Jr.'s. In fact, Sumner Gerard, Jr. did arrange substantial loans from Chemical Bank (which had indicated in advance of the transfers its willingness to loan funds, using Aeon stock as collateral) just before the start of the 1964 school term. (Tr. 155). The record below, moreover, is rather overwhelming in establishing the increasing financial crisis in which Sumner Gerard, Jr. found himself.

Petitioners submit that the Court below,

accepting facts which were largely uncontroverted, was clearly erroneous in reaching the conclusion that the transfers in question were in contemplation of death.

Respectfully submitted,

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